(5)

No. 10-1173

IN THE
Supreme Court of the United States

SERGEANTS BENEVOLENT ASSOCIATION HEALTH AND WELFARE FUND, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, ET AL.,
Petitioners,

v.

ELI LILLY AND COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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June 7, 2011

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CORPORATE DISCLOSURE STATEMENT

Petitioner Mid-West National Life Insurance Company of Tennessee's Rule 29.6 Statement was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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This Court's review is warranted because the Second Circuit's decision conflicts with *Bridge* on an important question of federal statutory interpretation. The court of appeals read the Chief Justice's partial opinion for this Court in *Hemi* as establishing a standard for causation under RICO that is inconsistent with the unanimous Court's holding and reasoning in *Bridge*. The resulting confusion regarding the appropriate standard for causation in a civil RICO action arises here in an exceptionally important and recurring context. Private third-party payors for health care, such as petitioners, are responsible for nearly one-half of the Nation's prescription-drug expenditures. *See* Amicus Br. of Dr. Brian C. Becker *et al.*, fig. 3 ("Becker Br."). Yet, under the Second Circuit's approach, the ability of those *private* payors to pursue an effective federal remedy for health-care fraud is severely limited, even though *governmental* third-party payors obtained hundreds of millions of dollars in compensation for losses arising from the same facts. As *amici* explain, that raises an issue of critical importance for the health-care industry. *See* Becker Br. 5 (if drug companies are subject to liability for only a portion of the losses resulting from their fraudulent marketing, "they are left with an economic incentive to engage in that fraudulent activity"); *see also* Amicus Br. for Labor Health Alliance ("LHA Br."). Respondent's attempts to reconcile the various authorities and to minimize the decision's importance are unpersuasive.

I. THE DECISION BELOW CONFLICTS WITH *BRIDGE* ON AN IMPORTANT QUESTION OF FEDERAL LAW

A. The Decision Below Conflicts With *Bridge*

1. Each of the Second Circuit's holdings turns on the notion that supposed intervening factors precluded petitioners from establishing causation. *See* Pet. 15-16. That approach cannot be squared with *Bridge*, which held that causation exists so long as a party's injury is a "foreseeable and natural consequence" of another party's fraud. 553 U.S. at 658. Here, it was plainly foreseeable that respondent's fraudulent marketing of Zyprexa would harm private third-party payors, just as it harmed the governmental third-party payors that recovered hundreds of millions of dollars from respondent. *See* Pet. 17-22, 26-27.

Respondent points out (at 22-23) that this case (unlike *Bridge*) involves class certification. But that distinction is immaterial, both because the Second Circuit ordered the entry of summary judgment for respondent *on the merits* of the overpricing theory, *see* App. 29a, and because the court of appeals' class-certification rulings turned on its conclusions about the *merits* of the causation issues — not on any supposed failure to satisfy Rule 23, *see* Pet. 15, 33.

Contrary to respondent (at 22), the Second Circuit's suggestion that "but for" causation could not be shown here likewise provides no basis for differentiating this case from *Bridge*. Neither the Second Circuit nor respondent offered any reasoning or authority to support the contention that, because physicians do not generally consider price when prescribing medications, "but for" causation cannot be shown on the overpricing theory. As the petition

explains (at 21), respondent's fraudulent marketing of Zyprexa enabled it to charge a "premium price" for the drug, regardless of whether doctors considered price in their prescribing decisions. *See also* Becker Br. 14-15 ("[F]raudulent marketing may be used by pharmaceutical companies, as it was in the case of Zyprexa, to justify a premium (monopoly) price for a drug where the drug's relative efficacy would not demand such a premium to competing treatments.").

With respect to the quantity theory, respondent does not argue that *no* third-party payor paid for excess prescriptions. Thus, uncertainty about the precise number of excess prescriptions for which a particular third-party payor paid pertains only to the calculation of damages. Such uncertainty neither defeats "but for" causation nor precludes class certification. *See* Pet. 21-22; *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 759 (7th Cir. 2011) (Posner, J.) (under RICO, "[o]nce the plaintiff proves injury, broad latitude is allowed in quantifying damages") (internal quotations omitted); *see also Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (Posner, J.) ("that a class will often include persons who have not been injured by the defendant's conduct . . . does not preclude class certification"), *cert. denied*, 130 S. Ct. 1504 (2010). Respondent offers no answer to that point.

2. Respondent also attempts to reconcile the Second Circuit's requirement of first-party reliance with *Bridge*. *Compare* App. 24a (asserting that it is "[c]rucial[]" that petitioners did "not allege that *they* relied on [respondent's] misrepresentations") *with Bridge*, 553 U.S. at 661 (holding that "a plaintiff asserting a RICO claim predicated on mail fraud need not show" that "it relied on the defendant's alleged

misrepresentations"). Respondent repeats (at 23) the Second Circuit's suggestion that first-party reliance is necessary in this case because only third-party payors "were in a position to negotiate the price paid for Zyprexa." App. 24a. But respondent neither acknowledges nor disputes that, given the nature of antipsychotic drugs, third-party payors were not in a position to refuse to pay for Zyprexa, making negotiations over price pointless. *See* Pet. 20-21. Under *Bridge*, the showing urged by respondent is unnecessary.

B. The Inconsistency Between *Bridge* And *Hemi* Is Creating Confusion In The Lower Courts

1. Respondent admits (at 21-22) that the Chief Justice's partial opinion for the Court in *Hemi* rejected foreseeability as a standard for RICO causation. And it does not contest either that Justice Ginsburg's separate opinion is properly viewed as articulating the holding of *Hemi* or that she did not join the plurality's rejection of foreseeability. *See* Pet. 24.

Respondent does, however, dispute (at 20-21) that *Bridge* adopted a foreseeability standard, asserting that *Bridge* actually grounded its causation holding on the bare assertion that the alleged injury was a "direct" result of the fraud. But the Court's opinion in *Bridge* makes plain that the injury there was sufficiently direct to satisfy RICO's causation requirement *because* it "was a foreseeable and natural consequence of [the defendant's] scheme." 553 U.S. at 658. The opinion identifies no other standard for determining causation, and the test the Court articulated — "foreseeable and natural consequence" — closely tracks common formulations for legal causation. *See Hemi*, 130 S. Ct. at 996-98 (Breyer, J.,

dissenting). Respondent's contrary interpretation of *Bridge* depends on the implausible premise that the Court articulated the "foreseeable and natural consequence" test but did not mean it.

Respondent incorrectly asserts (at 21) that the Court needed to overrule *Anza* to apply a foreseeability standard in *Bridge*. The plaintiff's causation theory in *Anza* failed because the conduct causing the alleged injury was "entirely distinct from" the alleged fraudulent conduct; intervening factors were responsible for the plaintiff's harm; and a more directly injured party existed to enforce the law. *See Anza*, 547 U.S. at 458-60. *Bridge* implicated none of those issues, *see* 553 U.S. at 658, and they are not found here, *see* Pet. 19-20 & n.5.

Moreover, the plaintiff in *Anza* did not advocate for a foreseeability standard. Instead, it argued that the RICO causation requirement was satisfied because it was the "intended victim" of the defendant's scheme. *See* Br. for Resp. at 36, 46 & nn.35-36, *Anza*, *supra*. The *Anza* dissent likewise believed that the plaintiff's allegation of intent sufficed to establish causation, rendering consideration of foreseeability unnecessary. *See* 547 U.S. at 470-71 (Thomas, J., concurring in part and dissenting in part). Although *Anza* held that an alleged intent to injure a competitor does not establish causation under RICO, *see id.* at 460-61, it did not address the concept of foreseeability. Thus, nothing in *Anza* foreclosed the adoption of a foreseeability standard in *Bridge*.[1]

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[1] Respondent's reliance (at 24-25) on the rehearing petition filed in the court below is misplaced. There, as here, petitioners explained that the court of appeals' reading of *Hemi* treated that case as "effectively overrul[ing]" *Bridge*, even though the Chief Justice's opinion did not purport to accomplish (and, given

2. Respondent denies (at 24) the existence of lower-court confusion over the meaning of RICO's causation element after *Bridge* and *Hemi*. But it ignores the Sixth Circuit's post-*Bridge* decision in *Brown v. Cassens Transport Co.*, 546 F.3d 347 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 795 (2009). *Brown* held that RICO's causation requirement is met when "the defendants' fraudulent acts were a substantial and foreseeable cause of the injuries alleged by the plaintiffs." *Id.* at 357 (internal quotations omitted); *see* Pet. 18-19. That standard for RICO causation clashes with the Second Circuit's reliance on the presence of supposed intervening factors to deny relief.

Respondent also ignores the Seventh Circuit's recent decision in *BCS*.[2] There, on remand from *Bridge*, the district court granted summary judgment for the defendants on causation, relying on *Hemi* to conclude that "any number of reasons wholly unrelated to" the alleged fraud could have caused the plaintiffs' losses. *Phoenix Bond & Indem. Co. v. Bridge*, Nos. 05-C-4095 *et al.*, 2010 WL 3526469, at *5, *13-*14 (N.D. Ill. Sept. 1, 2010). The Seventh Circuit reversed. The court began its analysis by explicating the doctrine of proximate cause, employing the concept of foreseeability of the plaintiff's injury.[3]

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the fractured Court, could not have achieved) such a result. Reh'g Pet. 1.

[2] The opinion in *BCS* was issued after the petition went to the printer, but *amici* discussed it. *See* LHA Br. 14-18.

[3] *See* 637 F.3d at 754 ("the doctrine of *proximate* cause does its work" when "too many unexpected things had to happen between the defendant's wrongdoing and the plaintiff's injury, in order for the injury to occur — so many unexpected things that the defendant couldn't have *foreseen* the effect of his

It then concluded that "[t]he doctrine ha[d] no application" there, emphasizing that the plaintiffs were "the only victims of the fraud." 637 F.3d at 756. The court also rejected the defendants' argument that the plaintiffs had "to offer evidence which positively exclude[s] every other possible cause of the [injury]." *Id.* at 757 (internal quotations omitted, first alteration in original). "Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct," the court explained, "he has done enough to withstand summary judgment on the ground of absence of causation." *Id.* at 758; *see id.* at 757 ("[T]he burden of proving an 'intervening cause' . . . is on the defendant.").

Unlike the Seventh Circuit, the court below held that the presence of other factors in the causal chain required summary judgment for the defendant. The *BCS* court squarely rejected that analysis, further deepening the confusion in the courts of appeals regarding the appropriate standard for RICO causation. Moreover, *BCS* reinforces the conclusion that, in light of the approval of class-wide relief for third-party payors in *In re Synthroid Marketing Litigation*, this case would have come out differently in the Seventh Circuit. *See* Pet. 28, 30.[4]

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wrongdoing") (second emphasis added), 755 (one reason "for limiting the right to relief to the initial victims of the wrong" is "to confine tort liability to *foreseeable* (as distinct from so improbable as to be *unforeseeable*) consequences") (emphases added), 756 ("[t]he doctrine of proximate cause . . . recognizes the limitations of deterrence (*unforeseeable* consequences of a person's acts will not influence his decision on how scrupulously to comply with the law)") (emphasis added).

[4] Neither the fact that *Synthroid* and other cases discussed in the petition (*see* Pet. 28-31 & n.12) involved settlements, nor the

Finally, respondent fails to explain away the conflict between the decision below and *Ironworkers Local Union 68 v. AstraZeneca Pharmaceuticals, LP*, a case involving materially indistinguishable facts. Although the concurring judge in that case would have followed the decision below, the panel majority conspicuously relied on a different rationale for rejecting the third-party payors' claim. *See* Pet. 30 n.13. Contrary to respondent (at 15), the fact that both courts reached the same ultimate outcome does not diminish the importance of clarifying the governing law. *See, e.g., Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418, 1425 & n.2 (2010) (the Court "granted certiorari to resolve a split among the Courts of Appeals over the proper standard" under a federal statute, even though no plaintiff had prevailed under either of the competing standards).

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fact that some of those cases involved antitrust claims, provides a basis for reconciling the success of third-party-payor claims in those cases with the rejection of such claims in this case, as respondent contends (at 16-18 & n.7). In approving a class-wide settlement, both the district court and, when there is an appeal, the court of appeals must ensure that "Rule 23's requirements" are met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997); *see id.* at 619-20 (although "[s]ettlement is relevant" in applying Rule 23, the provisions of the rule "designed to protect absentees by blocking unwarranted or overbroad class definitions . . . demand undiluted, even heightened, attention in the settlement context"). Further, this Court has based the RICO causation requirement on antitrust precedent, *see* Pet. 29 n.11, and respondent offers no basis for distinguishing the causation inquiries in RICO and antitrust actions.

C. The Ability Of Third-Party Payors To Recover For Health-Care Fraud Is Of Fundamental Importance To The Health-Care System

Whether private third-party payors will have an effective federal remedy for health-care fraud is a recurring question of national importance. Respondent does not dispute — but instead emphasizes — that litigation between third-party payors and drug companies is increasingly recurrent. *See* Opp. 15-19 & n.7, 26-27 (citing cases). Such cases commonly parallel federal investigations, as occurred here. When, as here, the defendant has pleaded guilty to federal criminal charges and paid hundreds of millions of dollars to reimburse governmental third-party payors, the pressing question is whether private payors will be allowed to pursue a comparable remedy for proven fraud.

Respondent seeks to minimize the impact of the Second Circuit's ruling, even as it admits (at 18) that courts have relied on the decision below in dismissing third-party payors' claims.[5] It suggests (at 26-27) that the inability to proceed as a class is immaterial. But it acknowledges that the Second Circuit rejected outright any attempt to seek even *individual* relief on an overpricing theory. Although respondent identifies one instance in which an individual third-party payor successfully pursued a case to judgment against a drug manufacturer, that entity (one of the largest HMOs in the country) is not representative of the many smaller third-party payors — such as the

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[5] Respondent's counsel has described the decision below as a "precedent" that "could head off a cause of action that has been growing in popularity." *Appellate Hot List*, Nat'l L.J., Apr. 18, 2011, at 12.

labor organizations and pension funds that are petitioners here — that suffer harm from fraudulent pharmaceutical marketing.

Respondent also suggests (at 27) that a third-party payor could seek relief under the theory recognized in *Desiano v. Warner-Lambert Co.*, 326 F.3d 339 (2d Cir. 2003), but neglects to mention that *Desiano* was decided under *New Jersey* law. *See id.* at 348 ("[T]he legal standard of proximate cause that is relevant to the case before us is not the law of RICO; it is, rather, the law of New Jersey."). The existence of a potential remedy under New Jersey law is cold comfort to third-party payors in the rest of the country. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-23 (1985) (Due Process and Full Faith and Credit Clauses limit circumstances in which one State's law can be applied in nation-wide class action).

Attempting to reconcile the denial of relief for *private* third-party payors with the recovery of hundreds of millions of dollars by *governmental* third-party payors, respondent relies (at 27-28) on the fact that the federal actions were brought under the False Claims Act ("FCA"). But it fails to identify anything that meaningfully differentiates a fraud-based civil RICO action from a fraud-based FCA suit. Under the FCA, a defendant is liable for compensatory damages that the government "sustains *because of* the act of that person." 31 U.S.C. § 3729(a) (emphasis added). Thus, like civil RICO, the FCA requires the plaintiff to "demonstrate the element of causation between the false statements and the loss." *United States ex rel. Longhi v. United States*, 575 F.3d 458, 473 (5th Cir. 2009) (internal quotations omitted), *cert. denied*, 130 S. Ct. 2092 (2010). But whereas the federal government obtains a recovery under the FCA, a private

person does not. Denying civil RICO damages to private parties thus deprives them of remedies for health-care frauds for which the government can recover.

II. ALTERNATIVELY, THE COURT SHOULD GRANT, VACATE, AND REMAND IN LIGHT OF *HALLIBURTON*

This Court's recent decision in *Halliburton* confirms that, if the Court determines not to resolve the confusion stemming from *Hemi* and *Bridge* now, it should grant the petition, vacate the judgment below, and remand for further consideration in light of *Halliburton*. *See* Pet. 31-34.

Respondent argues (at 32-36) that "*Halliburton* will not affect the outcome of this case" because "the fraud-on-the-market presumption has no application" here. But a fundamental premise of the Court's decision was that class certification cannot be denied on the ground that the plaintiff cannot establish causation on the merits. *See Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403, slip op. at 8 (U.S. June 6, 2011) ("The Court of Appeals erred by requiring [plaintiff] to show loss causation as a condition of obtaining class certification."). That principle applies not only in securities-fraud cases but also in other class actions, such as this one, in which a defendant raises an alleged inability to prove causation in opposing class certification.

Respondent also denies (at 35-36) that the Second Circuit considered the merits of the causation issues in reversing the class-certification order. Although the court below recited the appropriate standard for reviewing class certification, its bases for rejecting the district court's order rest squarely on the validity of petitioners' causation theories, not whether those

theories (if assumed valid) could be adjudicated on a class-wide basis. *See* Pet. 15, 33.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be granted, the judgment vacated, and the case remanded for further consideration in light of *Halliburton*.

Respectfully submitted,

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June 7, 2011